No. 148

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IN THE

SUPREME COURT

OF THE

United States

WATCHTOWER BIBLE AND TRACT SOCIETY, Inc.,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA, CITY OF LYNWOOD, CALIFORNIA, and H. L. BYRAM, County Tax Collector, Los Angeles County, California,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WESTERN PRINTING COMPANY, WHITTIER

TOPICAL INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutory and Constitutional Provisions Involved	3
Statement of the Case	5
Questions Presented	5
Specification of Errors to Be Urged	7
Reasons Urged for Granting the Writ	8
This Case Involves the Questions of Asserted Abridgement of the Freedom of Worship. It Does Not Involve as Well Any Question of Asserted Abridgement of the Freedom of the Press	9
The Decision of the Circuit Court Neither Imperils Nor Calls in Question Religious or Other Tax Exemption Granted by the State	13
The First Amendment Guaranteeing Freedom of Religious Worship and of the Press Guarantees Freedom of Thought and Action. It Does Not Grant Exemption From Non-Discriminatory Property Taxation	14
The Decisions Which Have Invalidated License Taxes on Religious Preaching or on Circulating Religious Literature Do Not Apply to a Non-Discriminatory Tax on Stored Printed Matter	16
The Decision is Not Based on Any Doctrine of Separation of Church and State and Does Not Withdraw a Tax Exemption Erroneously Ascribed to the First Amendment	17
The Questioned Tax is a Property Tax on the Stored Printed Matter—Not a License Exaction or Tax Upon an Act	18
Conclusion	27

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965 23
Breedlove v. Suttles, 302 U. S. 277, 82 L. ed. 252 24
Carter v. Greenhow, 114 U. S. 317, 29 L. Ed. 202 2
Church of Jesus Christ v. United States, 136 U. S. 1, 34 L. ed. 478 21
Davis v. Beason, 133 U. S. 333 21
Follette v. McCormick, 321 U. S. 573, 88 L. ed. 938 25
Grosjean v. American Press Co., 297 U. S. 233 22
Johnson Oil Ref. Co. v. Okla., 290 U. S. 158, 78 L. ed. 238 24
Joseph v. Carter & Weekes, 330 U. S. 422 20
McCollum v. Board of Education, 333 U. S. 203, 210 ..... o
Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1296 21
Nippert v. City of Richmond, 327 U. S. 416 22
Northwest Air Lines v. Minn., 322 U. S. 292, 88 L. ed. 1283 24
Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 319 U. S. 105, 87 L. ed. 1296 24
Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244 21
Richfield Oil Co. v. State Board of Equalization, 329 U. S. 69, 91 L. Ed. 80 12
St. Louis and S. W. Ry. Co. v. Nattin, 270 U. S. 157, 72 L. ed. 830 24
United States Express Co. v. Minnesota, 223 U. S. 335, 76 L. ed. 459 23
Wells Fargo & Co. v. Nevada, 248 U. S. 165, 63 L. ed. 190 23
West Virginia State Board of Education v. Barnette, 319 U. S. 624, 87 L. ed. 1628, 1640 21

Codes, Textbooks, etc.

Art. XIII, sec. 1, Constitution 3
Art. XIII, sec. 1½, Constitution 4, 13
Civil Rights Act of 1871 2
Judicial Code, Title 28, 41 (14) 2
Rev. & Tax. Code of California Sections 5136-5142 2
Rev. & Tax. Code,
Sections 254, 256 ..... 4, 13
Section 260 ..... 5, 13
Sections 5137, 5139 12
Title 28, United States Code, sec. 1331 or section 1343 (3) 2

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Opinions Below

The petition correctly refers to the Opinions below. (Pet. p. 2.) The opinion of the Circuit Court of Appeals, however, appears not only in the transcript of record. It is reported as well in 181 Fed. (2) 739.

Jurisdiction

The petition correctly recites the date of the judgment of the Circuit Court of Appeals and the statutes invoked as affording jurisdiction for the writ.

We argued below a want of Federal jurisdiction. The Circuit Court of Appeals concluded that jurisdiction existed. We submit again, however, the argument against jurisdiction.

This case was not, as recited by Paragraph I of the complaint, within the jurisdiction of the District Court under the cited Civil Rights Act of 1871 and the Judicial Code, Title 28, 41 (14), nor under the new Title 28, United States Code, sec. 1331 or section 1343 (3).

This action is purely an action under California statute authorizing suit for the recovery of taxes paid under protest. (Rev. & Tax. Code of California, sections 5136-5142.) It is not, within the provisions of said Federal statutes nor, thereunder, an action "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . ." The District Court did not gain jurisdiction because of asserted invalidity of tax predicated upon alleged infringement of Constitutional guaranties in the Bill of Rights. (*Carter v. Greenhow,* 114 U. S. 317, 29 L. Ed. 202.)

In that case Virginia State bonds had been issued under a statute which declared the coupons thereon legal tender in payment of taxes. Thereafter statute provided that taxes should be payable only in legal tender of the United States. Plaintiff tendered coupons from bonds acquired prior to the statute in payment of his taxes. The Tax Collector rejected the tender and

distrained on plaintiff's property to realize the tax. Plaintiff sued in trespass. Held that the statute impaired the contract in the bonds and violated the contract clause of the Constitution, but that the matter was not within the jurisdiction of the Federal Court until after relief had been sought and refused by the state court; and the Federal remedy was only by review of the state court decision.

This point of the want of jurisdiction in the District Court constitutes, of course, an additional ground for support of the judgment for defendants.

Statutory and Constitutional Provisions Involved

The petition quotes the provisions of State law which were cited by the Circuit Court of Appeals. (Pet. p. 4.) In addition should be noticed the provisions of the Constitution and statutes granting and controlling exemption of property used for religious worship, which the petition asserts are nullified by the decision herein.

Art. XIII, sec. 1, Constitution:

> "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and

things, real, personal, and mixed, capable of private ownership; . . ."

Art. XIII, sec. 1½, Constitution:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; provided that no building so used which may be rented for religious purposes and rent received by the owner thereof, shall be exempt from taxation."

Sec. 254, R. & T. Code:

"Any person claiming the church, orphanage, college, exhibition, or welfare exemption shall make a return of the property to the assessor annually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the board."

Sec. 256, R. & T. Code:

"Church exemption affidavit. The affidavit for church exemption shall show that:

(a) The building is used solely for religious worship.

(b) The described portion of the real property claimed as exempt is required for the convenient use of the building.

(c) It is not rented for religious purposes and rent received by the owner."

Sec. 260, R. & T. Code:

> "If any person, claiming any exemption named in this article, fails to follow the required procedure, the exemption is waived by the person."

Statement of the Case

The facts in the case are recited in the decision of the Circuit Court of Appeals, as alleged in the complaint, to wit:

> " . . . that appellant is a New York Corporation used exclusively by Jehovah's Witnesses, a religious organization, in spreading its religious doctrines. The corporation maintains a warehouse in the City of Lynwood, County of Los Angeles, which it uses as a storage place for religious books, pamphlets, etc., dealing with the religious doctrines of Jehovah's Witnesses. From this warehouse it distributes literature to its evangelists, missionaries and ministers. This literature was assessed as personal property subject to the California personal property tax." (Tr. of Rec. p. 71.)

Questions Presented

The statement by the petition of the questions presented is in the main adequate and correct. It is, however, subject to correction in two particulars.

(1) The statement of the questions presented omits the question of the jurisdiction of the Court; and

(2) The question presented is as to asserted abridgement of the freedom of worship. The statement represents that the case involves as well question of abridgement of the freedom of the press.

The questions presented herein are: (1) as to the federal jurisdiction and (2) as to the validity of the tax and of the state statute providing therefor, as applied without discrimination to petitioner's printed matter and religious literature in storage, as against the contention that such tax and such application of the tax statute violated the provision of the First Amendment assuring freedom of worship.

The petition submits its statement of the questions presented under numbers 1 and 2. (Pet. p. 2.) Under "1" the petition includes with the question of violation of freedom of worship a second question of asserted violation of the freedom of the press. (The question of freedom of the press, we submit, is not, indeed, herein presented). Under "2" the petition assumes that petitiner's printed matter and religious literature was nontaxable as within "the protection of the explicit provision of the First Amendment against abridgement of religion," (Pet. p. 2) and the petition asserts that the question is presented whether a so-called "separation of church and state doctrine" withdraws from petitioner such assumed "protection" from taxation. (The petition cannot thus beg the question whether its property is non-taxable under the First amendment. The Circuit Court of Appeals held, as before did the

District Court, that the tax did not infringe such freedom.)

No present constitutional question is herein involved.

The petition for certiorari should be denied. It raises no present constitutional question. The petition does purport to state a constitutional question. In truth, however, no constitutional question is involved. Actually the only possible constitutional questions have been settled. The decisions of this high court have already resolved them and against petitioner's contentions.

As the petition frankly concedes, petitioner has once before failed to support the very contentions now made before this Court. This Court has already denied petition for certiorari to review the determination of the California Supreme Court thereon in a case by Watchtower Bible and Tract Society against these same defendants, 30 Cal. (2) 426. Petition for certiorari denied by this Court, 332 U. S. 811.

Specification of Errors to Be Urged

The petition charges that "the Court of Appeals erred" in six stated particulars. (Pet. p. 8) Specifications 1, 2, 4, 5 and 6 charge that denial of tax exemption and sustaining the judgment of the District Court violated the provision of the First Amendment assuring freedom of press and of worship.

Specification 3 misconceives the decision of the Court of Appeals and charges error therein, to wit:

> "(3) In holding that the separation of church and state doctrine withdrew from the petitioner the protection of the First Amendment because to declare the tax invalid would be to aid one of the 'religious groups to spread their faith', contrary to the holding of this Court in *McCollum v. Board of Education,* 333 U. S. 203, 210." (Pet. p. 8) (And similarly, ib. p. 25.)

Reasons Urged for Granting the Writ

The petition makes no summary or even precise statement of the reasons it urges for granting the writ. Under the above heading, however, the petition sets up under Roman numerals four divisions.

In division I, the petition asserts that

> ". . . the decisions of the courts below imperil the uniform practice throughout the United States of granting religious exemption from taxation." . . . (Pet. p. 9.)

In division II, the petition asserts that:

> ". . . things used which are necessary to the enjoyment of the rights guaranteed by the First Amendment are as strongly protected from taxation as are things that move in foreign commerce protected against taxation by the 'import-export clause' of the Constitution. . . ." (Pet. p. 11.)

In division III, the petition asserts that:

> "the decisions below fail to give effect to applicable decisions of this court holding the license tax and other taxes unconstitutional when applied to the distribution of literature. . . ." (Pet. p. 12.)

In division IV, the petition asserts, in repetition of its misconceived third "specification of error to be urged," (Pet. p. 8), that the Court of Appeals erred in denying tax exemption to petitioner's property on the alleged ground that tax exemption amounted to a state subsidy to one religious group to spread their faith.

This Case Involves the Question of Asserted Abridgement of the Freedom of Worship. It Does Not Involve as Well Any Question of Asserted Abridgement of the Freedom of the Press.

The question herein presented is as to the validity of the provision of the California Constitution and statutes as they authorize and require taxation of all taxable property including Watchtower's pamphlets, books and other printed matter and stationery supplies in storage in the City of Lynwood and question whether such provisions of Constitution and statutes or the taxes levied thereunder upon said property were void and unconstitutional as abridging the *freedom of worship.* The case does not involve, as well, question of asserted abridgement of the *freedom of the press.*

The findings by the trial court quoted the grounds of objection in the written protest which accompanied appellant's tax payment and declared precisely that the controversy between plaintiff and defendants was as to whether the taxes constituted "an abridgement of the provisions of the California and Federal Constitutions guaranteeing freedom of worship." (Rec. 38-39.)

Petitioner, however, seems to attempt in its petition, as before upon the appeal to the Circuit Court, to broaden the question beyond that raised by the complaint and considered and determined by the trial court. Points 2 and 3 of purported "Points to be Relied upon" (ib. p. 63) state beyond the question authorized by the protest and the complaint (the question of asserted abridgement of freedom of worship) a further and unauthorized question (the question of asserted abridgement of the freedom of the press). (Ib. 64.)

The petition too states as the first question presented,

> "whether the California Revenue and Taxation Code and the ad valorem personal property tax assessed thereunder, as applied to the facts of this case abridge freedom of press and freedom of worship contrary to the First Amendment?" (Pet. p. 2.)

The petitioner further asserts that "the complaint contended that the statute authorizing the taxes and the taxes assessed and collected were void and uncon-

stitutional because abridging appellant's rights to freedom of press and freedom of worship. . . . " (p. 6.)

To the contrary, the complaint charges merely:

> ". . . abridgement of the provisions of the California and Federal Constitutions guaranteeing freedom of *worship.*" (Rec., pp. 38-39.)*

Dist. Judge Yankwich, in his written opinion ordering judgment for defendants, so read the complaint. He said:

> "The complaint asserts that the tax on the literature,—books and pamphlets,—of the plaintiff of the assessed value of $5,220.00 is a tax on its freedom of *worship* and violative of the guaranties of the first amendment." (Ib., p. 25.)

And, again,

> "In short, we take it to be the law that the guaranty of free *worship* does not prevent the taxation

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*The court may notice that paragraph XIX of the complaint, quoting the grounds of objection by the written protest accompanying the tax payment included a recital that "the enforced collection of the taxes by the collector is an exaction, enforcement and construction of the statute which makes the taxation statutes invalid and unconstitutional as construed and applied in this case for the reason that the rights of this society to freedom of press and of worship of Almighty God are hereby denied . . . " (Ib. p. 13.)

That recital, as plaintiff's counsel has conceded however, does not raise the issue of freedom of the press. He stipulated upon the trial that " . . . paragraph XIX is a mere recital of the statement of the letter accompanying the tax, stating that the tax was being paid under protest, and that the taxes were unconstitutional and an abridgement of plaintiff's right of *freedom of worship.*" (Ib. p. 59.)

Similarly, as to the recital of paragraph XXI of the complaint, that a controversy between the parties existed as to the tax and the statute authorizing the tax as abridging plaintiff's freedom of press and of worship, (Ib. p. 14) plaintiff stipulated that "the defendants have denied paragraph XXI which is really a legal conclusion. That is, we have alleged in paragraph XXI that a bona fide controversy exists before the Court for determination." (Ib. p. 60.) And, as we have noticed, the Court's finding was limited to declaration that the controversy was as to asserted abridgement of the freedom of worship.

> as property of goods and things, be they books or not, while they are in storage and waiting to be distributed or used by members of a religious group.

A tax refund suit is limited by the written protest and may be based only on the grounds therein stated. The protest is the jurisdictional basis of the suit. Such is the specific provision of the controlling statute.

> "The protest shall be in writing specifying (a) whether the whole assessment is claimed to be void or if only a part, what portion; (b) the *grounds* on which the claim is founded." (R. & T. Code 5137.)

Section 5139 specifically declares that

> "The action may be brought only . . .
> (b) on *the grounds* specified in the protest . . ."

Such limitation has recently been declared in the case of *Richfield Oil Co. v. State Board of Equalization,* 329 U. S. 69, 91 L. Ed. 80, where this Court said:

> "The claim thus frames and restricts the issues for the litigation. . . ." (p. 87.)

Petitioner's argument that "The First Amendment safeguards liberty of circulation as well as liberty of publication" (ib. p. 16) even if question of freedom of the press were involved is quite inapplicable. The tax was not upon any act of "publication" or circulation.

The Decision of the Circuit Court Neither Imperils Nor Calls in Question Religious or Other Tax Exemption Granted by the State.

Division 1 of the petition, under "Reasons Relief on For Granting the Writ", presents the contention that the decision imperils tax exemptions granted by the States, (Pet. p. 9) and denies to the States the power to grant tax exemption to religious institutions. The petition says:

> "If it is unconstitutional to afford exemption from taxation because such would be aiding a religious group by the state in violation of the separation of church and state doctrine . . . then hundreds of thousands of churches in this country have suspended over them a sword of Damocles . . ." (p. 9.)

And, again, on the same page:

> "Not only are the legislative and constitutional policy of all the states and the District of Columbia imperiled by the doctrine of the decision below but also the welfare of all the churches is affected and imperiled. . . ." (p. 9.)

This is mere misreading of the decision and entire misconception of its effect. Tax exemption, of course, is matter of state law (e. g. in California Constitution Art. XIII, Sec. 1½; R. & T. Code, Sec. 254, 256, 260). No question of exemption granted or withheld by state law is herein involved. The First Amendment does not grant exemption from a non-discriminatory general

property tax merely because a property subject to such tax is stored literature. The opinion suggests no least doubt of the right of a State, in constitution or statute, to exempt property from taxation. What the opinion commented was that if the *judicial department* were to excuse one religious group from a general non-discriminatory tax (and independent of Constitutional or legislative grant of exemption to those in such class) it would be "arguable" that it aided such one special group to spread its faith. The decision does not touch and cannot affect tax exemption granted by state law.

The First Amendment Guaranteeing Freedom of Religious Worship and of the Press Guarantees Freedom of Thought and Action. It Does Not Grant Exemption From Non-Discriminatory Property Taxation.

Division II of the petition, under "Reasons Relied on for Granting the Writ", presents the contention that things used in religious worship are exempt from taxation, in analogy to things in foreign commerce under the import-export clause.

Therein the petition quite misapprehends the scope of the protection assured by the Bill of Rights. Its protection is protection of the specified personal rights to do and to think and to act, protection of personal rights, not protection of property.

The guaranties by the First Amendment of freedom of religious worship and of speech and of the press are assurance of freedom of action, not exemption from

equalized and non-discriminatory property taxation. The petition merely assumes that under the Bill of Rights Watchtower's tracts and other printed matter are tax exempt and then argues that the mere storage thereof does not "forfeit" the assumed exemption.

Petitioner's objection to the tax is clearly mistaken in two particulars:

(1) The Constitution assures freedom of action in the specified realms, of speech, press and worship, and assembly and petition, but not in the realm of property or of property ownership free from taxation.

(2) The tax herein was not a tax or a levy upon any action or activity or burden upon any of the specified freedoms. The Constitution does assure the ownership of property under the due process and equal protection and the just compensation clauses, but it has never been thought that the First Amendment freed private property from equalized non-discriminatory taxation.

The freedoms of speech and of the press and of worship are personal rights and liberties in the three named spheres (1) of speaking, and (2) of writing, and printing and publishing and circulating, and (3) of worshipping.

Any tax attempted as a condition of or prerequisite to the exercise of such freedom or right to do or to act would infringe. The guaranty is not a guaranty with regard to property or property ownership—not even

with regard to property used or to be used in the exercise of or in connection with the guaranteed activity. The brief is quite confused in its idea that "things used which are necessary to the enjoyment of the rights guaranteed by the first amendment are as strongly protected from taxation as are things which move in foreign commerce protected against taxation by the import-export clause of the Constitution." (Pet., p. 11.) The property moving in commerce is itself the subject of commerce. That property is what is protected. The printed matter in storage (or even a hymn book or Bible used in worship) are not the subject of the assurance—instead, the right or freedom to worship is what is protected.

The Decisions Which Have Invalidated License Taxes on Religious Preaching or on Circulating Religious Literature Do Not Apply to a Non-Discriminatory Tax on Stored Printed Matter.

Division III of the petition, under "Reasons Relied on for Granting the Writ", contends that the decisions of this Court invalidating license taxes imposed upon the acts of preaching or circulating literature here apply and assure petitioner of tax exemption for the stored printed matter. Such disapproved ordinance or exaction was a restrictive limitation upon the activity and on the freedom of religious worship and of speech. Such freedoms of thought and action are not infringed by non-discriminatory taxation of property, even though the property is employed in the protected

activities. A tax upon the stored printer matters is not a tax upon any act of worship or of printing or of publishing. Yet the brief asserts that

> "The taxing of any step in the process of printing, publishing and distributing literature is an unconstitutional abridgement of freedom of press." (Pet. pp. 16-17.)

Freedom to print or immunity for "the process of printing" embrace neither the machinery nor the materials used in printing, nor later, the printed product.

The Decision is Not Based on Any Doctrine of Separation of Church and State and Does Not Withdraw a Tax Exemption Erroneously Ascribed to the First Amendment.

Division IV of the petition, under "Reasons Relied on for Granting the Writ", says that the decision by the Circuit Court of Appeals withdraws from petitioner tax exemption under the First Amendment because the doctrine of "separation of Church and State" forbids aid to one of the religious groups to spread their faith.

The opinion makes no declaration as to "separation of church and state". Its support of the tax was not based on the ground that "to declare the tax invalid would be to aid one of the religious groups." Instead, the opinion merely observed in passing that

> "Furthermore, it is arguable that isolating the corporation because of its religious character and requiring the state and municipality gratuitously to

> furnish it such services would be utilizing a tax 'to aid (one of the) religious groups to spread their faith.' . . ." (Rec. p. 74.)

The First Amendment neither grants tax exemptions nor concerns property.

The Questioned Tax is a Property Tax on the Stored Printed Matter—Not a License Exaction or Tax Upon An Act.

The petition at times soundly appreciates the questioned tax for what it truly is, to wit, a general ad valorem tax on all tangible personal property, including petitioner's stored religious books and pamphlets. The petition soundly observes that

> "All that is involved here is the ad valorem tax upon personal property." (Pet. p. 9.)

And, again, on the following page:

> "The issue of whether the state can tax religious literature (in storage to be distributed or to be) used by a preacher as a part of his worship is a presently existing controversy." (p. 10.)

But upon that issue so recognized, the petition then propounds the proposition that

> "The literature used in preaching the gospel of God's kingdom by Jehovah Witnesses is protected from taxation by the First Amendment." (Ib. p. 20.)

Generally, however, the petition confuses the issue.

The brief seeks to see this property tax as a tax on an act, to wit, either concurrently or in succession as a tax on printing, on publishing, on distributing, or on storing. The tax is a tax on the property, not a tax on any act or any step in the process of "printing" or "publishing" or "distributing." Petitioner may not dislocate the tax from its actual imposition upon the property, in order to affix it to an act. It does not aid petitioner to urge that

> "Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' . . . " (Ib. p. 17.)

The tax yet is not a tax on *publication* or on *circulation.*

The brief coins a metaphor, and calls publication a "stream". It visions a "flowing stream of publication," and says that "the entire flowing stream must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States." (Ib., p. 18.) Under the euphony of its metaphor, the brief asserts that the Constitution's protection "extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California." (Ib., p. 18.)

Again, in the endeavor to affix the tax to something else than to the property, the brief tries to affix it to the storing of the literature Carried on by the sweep and current of its metaphor, the brief continues:

> "Storage of the literature at the Lynwood depot by the petitioner is as much as any other act a part of the process of circulation. It is as much a part of the circulation process as is the handing of a piece of literature by one of the missionary evangelists to a person, as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any value. . . . " (Ib., p. 17.)

What was taxed was not any act, not the act of storing literature, but, instead, the mere property. The power and the right to act (to publish, to store, to circulate, to worship) continued unrestricted and entirely free.

The tax upon the stevedoring of ship cargo *was* unconstitutional taxation of a vital step or activity in foreign commerce, indeed a step and activity in the very exporting process. (*Joseph v. Carter & Weekes,* 330 U. S. 422. (Cited, Pet., p. 19.)

Non-discriminatory taxation of stored literature as personal property is by no possibility taxation of the activity of producing or distributing or storing the literature. *Petitioner must not assert that to have been taxed which was not taxed. It is not open to petitioner*

to assert taxation of the act of speaking or of printing, publishing or circulating, or of the act of worshipping when instead, the taxation was taxation of the property in storage. It is no more open to the claimant of a right to declare the incidence of a tax, contrary to the fact, than it is open to the claimant of a right to worship to determine something to be worship which by no possibility is worship. Freedom of worship does not excuse polygamy. (*Church of Jesus Christ v. United States,* 136 U. S. 1, 34 L. Ed. 478; *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244.)

As said by this Court in *Murdock v. Pennsylvania,* 319 U. S. 105, 87 L. Ed. 1296:

> "We do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioner swept into the First Amendment. *Davis v. Beason,* 133 U. S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well rise which deserve the same fate."

As Mr. Justice Black wisely cautions:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do." (*West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 87 L. Ed. 1628, 1640.)

Merely asserting that a book or tract is worship cannot constitute such property an act. A book or

printed matter is not worship—not an act nor any part or step in the act of preaching, or of the process of worship. A *thing* is not the protected action. A noun is not a verb.

Clearly the freedom of speech does not free the printer from tax burdens common to all. The printer is subject to non-discriminatory taxes upon his presses and printer's supplies and materials. (*Grosjean v. American Press Co.*, 297 U. S. 233.)

The brief's consideration of *Nippert v. City of Richmond,* 327 U. S. 416, (Br., p. 27) points petitioner's confusion in the assertion that "the literature protected by the Bill of Rights against taxation is as free from the *ad valorem* taxes as is goods in interstate transit." (Pet., pp. 20-22.) Goods while in transit are exempt because in interstate commerce. Petitioner's literature at rest and in storage is not in transit, nor exempt as the act of publishing or of worshipping. The Court in the *Nippert* case says that a tax upon "some local incident" in the course of interstate commerce constitutes a tax upon the commerce itself. Petitioner seeks to see its taxed printed matter as an "incident" in worship. An "incident," of course, is a part of an act or happening. The Court in the *Nippert* case speaks of acts and incidents which "take place within the confines of the states" and "incidents occurring within each state," definitely indicating that the Court was talking about acts and happenings and not about physical property.

The exemption of property in interstate commerce does not exempt the rolling stock of the railroad. The exclusive jurisdiction of the Federal Government over interstate or foreign commerce and the assured freedom thereof from State control does not free from nondiscriminatory taxation the railroad cars or vessels or the other physical instruments of such commerce.

In *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185, 41 L. Ed. 965, the Court said:

> "Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce." (p. 976.)

In *United States Express Co. v. Minnesota,* 223 U. S. 335, 56 L. ed. 459, the Court said:

> "The right of the state to tax property, although it is used in interstate commerce is thoroughly well settled. . . .

In *Wells Fargo & Co. v. Nevada,* 248 U. S. 165, 63 L. ed. 190, the Court said:

> " . . . consistently with the commerce clause of the Federal Constitution, the state could not tax

the privilege or act of engaging in interstate commerce but could tax the company's property within the state, although chiefly employed in such commerce. . . . " (p. 191.)

And see:

Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U. S. 18, 35 L. ed. 613;

Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1296;

Johnson Oil Ref. Co. v. Okla., 290 U. S. 158, 78 L. ed. 238;

Northwest Air Lines v. Minn., 322 U. S. 292, 88 L. ed. 1283;

St. Louis and S. W. Ry Co. v. Nattin, 270 U. S. 157, 72 L. ed. 830.

Breedlove v. Suttles, 302 U. S. 277, 82 L. ed. 252, upheld the validity of a Georgia statute imposing and requiring payment of a poll tax as a prerequisite to the right to register and vote, as against the contention that it was an infringement of the privileges and immunities assured by the Fourteenth Amendment and the Nineteenth Amendment. The language of the court as to the Nineteenth Amendment and the right to vote is directly applicable here. The Court discredited the very contention made by petitioner herein, saying of the constitutional amendment:

"Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a

limitation upon the power to tax. . . . " (Ib., p. 256.)

In Follette v. McCormick, 321 U. S. 573, 88 L. ed. 938, the Court pointed the error of Watchtower's claim of immunity from tax herein when it said:

> "The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property."

The Constitution assures certain personal liberties and privileges. Specifically, the Bill of Rights assures freedom of speech and assemblage and the freedom to print and to publish (the freedom of the press) and the freedom of worship. These assured rights are rights to act and to do, to wit, the right to speak, to communicate, to print, to publish, to assemble, to petition, to worship. Infringement thereof, can result only if some questioned act infringes such freedom to act and to do. The assurance of these personal freedoms does not extend into or touch the realm of property.

The distinction between the two types of right is basic. The assured freedoms of speech and of assemblage and the right to print and publish and to worship are not violated by uniform and non-discriminatory taxation of tangible personal property whether intended to be used or even used in their exercise.

Four possible aspects may be considered in connection with the freedoms guaranteed by the First Amendment, to wit:

(1) the assured freedom itself, i.e., the protected Act (speaking, communicating, printing, publishing or worshipping);

(2) the physical instrument or agent used in the activity of speech, press or worship (machinery, bibles, books, musical instruments);

(3) the product (book or newspaper, printed matter or record);

(4) the materials for, or the machinery or equipment used to produce, book or newspaper or the like.

The first alone of the foregoing four is the assured personal freedom and liberty, i.e., freedom as to the specified act by the Constitution as the right of a free people. The assurance does not extend to property, nor intend the release of property from non-discriminatory tax or other lawful control.

Petitioner has fallen into the error of considering and arguing about the property (to be) used in worship rather than the act of worship and the freedom to worship. It has considered its store of printed matter and other stationery rather than the right to print and to publish and to circulate (and, we submit, not even the latter is herein involved). That is to say, petitioner in considering the scope of the First Amendment has improperly considered and argued above indicated

aspects (2) and (3) of the subject the property connected with the act and not aspect (1), the protected act and the specified freedom itself.

The non-discriminatory tax upon the stored property did not violate any constitutional assurance or abridge any assured right.

Conclusion

It is respectfully submitted that the writ of certiorari prayed for in the petition herein should be denied.

Respectfully submitted,

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